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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN MITCHELL LAMB,

Defendant and Appellant.

D066152

(Super. Ct. No. SCE334380)

APPEAL from a judgment of the Superior Court of San Diego County, John M. Thompson, Judge. Reversed in part, affirmed in part, and remanded with directions.

Susan L. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Andrew Mestman, Elizabeth M. Carino, Deputy Attorneys General, for Plaintiff and Respondent.

This case arose out of a liquor store robbery in La Mesa. A jury found Steven Mitchell Lamb guilty of second degree robbery (count 1: Pen. Code,¹ § 211), aggravated assault (count 2: § 245, subd. (a)(4)), and petty theft (count 4: § 484); but found him not guilty of burglary (count 3: § 459). Lamb admitted the truth of allegations he had suffered (1) a prison prior within the meaning of sections 667.5, subdivision (b), and 668; (2) a serious felony prior within the meaning of sections 667, subdivision (a)(1), 668, and 1192.7, subdivision (c); (3) a strike prior within the meaning of sections 667, subdivision (b) through (i), 668, and 1170.12; and (4) as to count 4 (petty theft), a prior violent or serious felony conviction as specified in sections 667.5, subdivision (c), and 1192.7, subdivision (c), within the meaning of section 666, subdivision (b)(1) (hereafter section 666(b)(1)).

On May 29, 2014, the trial court sentenced Lamb to a total of nine years in state prison, consisting of the low term of two years, doubled to four years pursuant to the Three Strikes law (§§ 667, subds. (b)-(i), 668, 1170.12) as a result of the prior strike, for his count 1 second degree robbery conviction; plus a consecutive term of five years for the serious felony prior. The court also struck the prison prior and sentenced Lamb to a concurrent term of four years for his count 2 aggravated assault conviction and to a concurrent term of two years eight months for his count 4 petty theft conviction and the true finding on the count 4 section 666(b)(1) allegation. (CT 99 [abstract], 138 [sentencing minutes].)

¹ All further statutory references are to the Penal Code.

Lamb raises two contentions on appeal. First, he contends his count 4 conviction of petty theft with a prior must be reversed because it is a lesser included offense of his robbery conviction and he cannot lawfully be convicted of both. Second, he contends the concurrent four-year sentence imposed for his count 2 aggravated assault conviction should be stayed pursuant to the prohibition against multiple punishment set forth in section 654. The Attorney General acknowledges that Lamb's conviction of petty theft with a prior must be reversed because it is a lesser included offense of his robbery conviction.

We reverse Lamb's count 4 conviction of petty theft with a prior and reject his contention the concurrent four-year sentence imposed for his count 2 aggravated assault conviction should be stayed under section 654. We remand with directions.

FACTUAL BACKGROUND

A. The People's Case

The victim in this case, Hytham Mansour, testified he owned Severin Liquor and Deli in La Mesa. In the evening on April 27, 2013, Mansour was working in the store with his employee, Sarmad Shamoon. Mansour was in the back behind the deli counter. Shamoon was working at the cash register located next to a cabinet displaying 150 miniature bottles of liquor. These bottles were 60 to 70 years old and were not for sale.

At around 7:00 p.m., a group of four people—a male, a bald second male, and two females—entered the liquor store. The bald male walked to the back of the store, one of the females stood near the cash register, and the other female went to grab some beer. The other male was carrying a bottle of Coke when he walked into the store, and he drank

from the bottle while he was inside. Mansour saw that man walk to the display of miniature liquor bottles, grab a miniature bottle of brandy, and put it in his back right pocket.

The group then purchased some beer and started to leave the store without paying for the miniature liquor bottle. By the front door, Mansour confronted the male who had taken the miniature bottle of brandy and asked him where it was. The man replied, "I don't have anything." Mansour accused him of stealing the bottle and warned him not to drink the liquor because it was very old and could poison him. During this confrontation, the other members of the group were standing in the parking lot.

The male continued to deny stealing the miniature liquor bottle. Mansour turned around to see if the male had left the bottle at the counter, but there was nothing on the counter. The man threw his bottle of Coke on the ground and it rolled into the parking lot. While Mansour was turned away from him, the man "sucker punched" him on the side of the head. He then kicked Mansour in the groin. Mansour responded by picking up a case of water bottles and throwing it towards the assailant. The water bottles missed him and landed in the parking lot.

The momentum of throwing the case of water bottles caused Mansour to *fall down on his knees* outside the store. While Mansour was on his knees, the assailant started kicking him in the head. Mansour testified he was kicked in the head three times.

Shamoon testified that he went outside when he saw Mansour being kicked in the head. Shamoon jumped on the assailant and punched him. Mansour was able to stand up and go back inside the store. The assailant pushed Shamoon up against the wall.

Shamoon then ran away into the parking lot. At the same time, the two females were throwing at Shamoon the water bottles that had rolled out onto the parking lot. Shamoon ran back inside the store and someone called the police. The group then left the liquor store parking lot.

At trial Shamoon described himself as "still an English learner" and testified the assailant "had tattoo was [*sic*] in his hand" that extended from the forearm to the hand. Shamoon was not sure whether the assailant had other tattoos. Mansour testified he (Mansour) was six feet three inches tall, and the assailant had a "medium build" and was five feet 11 inches or six feet tall.

Within five minutes, officers arrived at the scene and interviewed Mansour and Shamoon. Mansour and Shamoon gave brief descriptions of the suspects. After the descriptions were broadcast over the radio, additional police responded and searched the surrounding area. The assailant's Coke bottle was found in the parking lot, about five meters from the front door of the liquor store. Officers collected the Coke bottle and sealed it with evidence tape in a new paper bag. It was then sent to the San Diego County Sheriff's Crime Laboratory (Crime Lab) to be checked for latent fingerprints and potential DNA evidence.

Mansour never recovered the miniature brandy bottle. Mansour suffered cuts and bruises around his temple and bruising in his groin.

Rebekah Neyhart, a criminalist with the Crime Lab, obtained a DNA sample from the interior lid and the mouth opening of the Coke bottle. The DNA profile had two DNA contributors—a major contributor and a minor contributor. Neyhart testified that

the minor DNA profile contained such a low level of DNA that it was not suitable for any type of comparison. However, Neyhart concluded that the DNA profile of the major contributor matched Lamb's DNA profile.

Alicia Garcia, a latent print examiner with the Crime Lab, analyzed fingerprints found on the Coke bottle. Garcia concluded that the latent print on the Coke bottle was inconclusive. However, based on the similarities in the markings, she concluded that Lamb could not be excluded as the person who left the fingerprint on the Coke bottle.

B. The Defense

Lamb's defense was mistaken identity. Detective Dale Perry of the La Mesa Police Department testified for the defense that eight hours after the robbery officers contacted four individuals, two of whom matched the physical descriptions of the suspects. Several days later, Detective Perry conducted a follow-up investigation and talked to Mansour and Shamoon, who indicated they thought they would be able to identify the people responsible for the robbery. Detective Perry put together a photographic lineup and returned to the liquor store a few days later to show it to Mansour and Shamoon. However, they both indicated they would not be able to identify the perpetrators. As a result, Detective Perry never showed them the photographic lineup.

DISCUSSION

I. PETTY THEFT WITH A PRIOR (COUNT 4)

As pertinent here, Lamb was convicted of one count of robbery (count 1: § 211) and one count of petty theft with a prior (count 4: §§ 484, 666(b)(1)).

Lamb contends, and the Attorney General acknowledges, that Lamb's count 4 conviction of petty theft with a prior must be reversed because it is a lesser included offense of his robbery conviction and he cannot lawfully be convicted of both robbery and petty theft with a prior. We agree.

A defendant cannot lawfully be convicted of both a greater and a lesser included offense. (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227.) Also, "a defendant cannot be convicted both of robbery and petty theft with a prior, arising from the same incident, because the prior conviction is a sentencing factor, rather than an element, so petty theft with a prior is a lesser included offense of robbery." (*People v. Villa* (2007) 157 Cal.App.4th 1429, 1431.)

Here, as Lamb was unlawfully convicted of both robbery (count 1) and the lesser included offense of petty theft with a prior (count 4), his conviction on count 4 must be reversed. (*People v. Villa, supra*, 157 Cal.App.4th at pp. 1431, 1435.)

II. SECTION 654 (COUNT 2)

Lamb also contends the concurrent four-year sentence imposed for his count 2 aggravated assault conviction should be stayed pursuant to the prohibition against multiple punishment set forth in section 654 because (1) his acts of robbing and assaulting Mansour "occurred during the same course of conduct" when Mansour confronted and tried to stop Lamb as he was leaving the store, and (2) "the assault is the *same act* that constitutes the use of force making the crime a robbery." We reject this contention.

A. Section 654

Section 654, subdivision (a) provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Section 654 "precludes multiple punishment for a single act or omission, or an indivisible course of conduct" (*People v. Deloza* (1998) 18 Cal.4th 585, 591 (*Deloza*)) and ensures the defendant's punishment will be commensurate with his or her criminal culpability (*People v. Kramer* (2002) 29 Cal.4th 720, 723). If a defendant suffers two convictions and punishment for one is barred by section 654, "that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed." (*Deloza*, at p. 592.)

Whether a course of conduct is indivisible for purposes of section 654 depends on the intent and objective of the defendant, not the temporal proximity of the offenses. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) Generally, if all the criminal acts were incident to one objective, then punishment may be imposed only as to one of the offenses committed. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1781.)

C. Analysis

The Attorney General asserts that "[i]n closing argument, the People used [Lamb's] acts of 'sucker punching' Mansour and kicking him while he was on the ground to establish both the aggravated assault and the element of force in robbery." The

Attorney General also asserts Lamb's act of "kick[ing] Mansour multiple times in the head while [he] was helpless on the ground" constituted an act of gratuitous violence because Lamb "could have easily fled the scene" and thus the court properly found the act of kicking Mansour was sufficiently divisible from the robbery to justify multiple punishments. We conclude Lamb's act of kicking Mansour in the head while he was on the ground was an act of gratuitous violence and the court properly found this assault was divisible from the robbery so as to justify the multiple punishments.

"Robbery is defined as 'the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.'" (*People v. Anderson* (2011) 51 Cal.4th 989, 994, quoting § 211.) Aggravated assault is "an assault upon the person of another by any means of force likely to produce great bodily injury." (§ 245, subd. (a)(4).) "The crime of robbery is a continuing offense that begins from the time of the original taking *until the robber reaches a place of relative safety*." (*Anderson*, at p. 994, quoting *People v. Estes* (1983) 147 Cal.App.3d 23, 28, italics added.)

Here, the evidence (discussed in greater detail, *ante*) shows that after Lamb sucker punched Mansour and kicked him in the groin, and after Mansour fell after throwing the case of water bottles at Lamb as he was trying to escape, Lamb could have left the scene. He chose instead to assault Mansour by kicking him in the head.

The evidence thus shows Lamb had reached a "place of relative safety" (*Anderson, supra*, 51 Cal.4th at p. 994) before he committed the act of kicking Mansour for which he was convicted of aggravated assault. The assault was an act of gratuitous violence, and

the robbery and the assault were not an "indivisible course of conduct" (*Deloza, supra*, 18 Cal.4th at p. 591) for purposes of section 654. Accordingly, we conclude section 654 does not apply and the concurrent four-year sentence imposed for Lamb's count 2 aggravated assault conviction should be affirmed.

DISPOSITION

Lamb's conviction of petty theft with a prior (count 4) is reversed. In all other respects the judgment of conviction is affirmed. The matter is remanded to the superior court with directions to correct the May 29, 2014 sentencing minutes and the abstract of judgment to reflect this modification of the judgment and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

HUFFMAN, J.